AT

UNITED
NATIONS

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 490

Case No. 536: LIU

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 8 February 1990, Shih Liu, a former staff member of the United Nations, filed an application, containing the following pleas:

"II - PLEAS

Applicant respectfully requests that the Tribunal:

1. Order the Respondent to rescind his decision to dismiss him from service for misconduct;

2. Order the reinstatement of Applicant to the status quo ante;

3. Order the Respondent to give greater weight to the unanimous recommendation of the JDC [Joint Disciplinary Committee], taking into full consideration the mitigating circumstances;

4. Alternatively, order the Respondent to accept a resignation from Applicant and amend the record of Applicant's separation accordingly, in which case, order the Respondent to pay adequate compensation

fixed by the Tribunal in lieu of or in addition to specific performance, for the injury and severe humiliation he has suffered as a result of the dismissal;

5. Alternatively, order that compensation be in an amount equivalent to the termination indemnity prescribed in ANNEX 1II to the Staff Regulations."

Whereas the Respondent filed his answer on 7 May 1990;

Whereas the Applicant filed written observations on 15 June 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 6 July 1967. He served in the Chinese Service of the Department of Conference Services, first, as a Calligrapher and then, as a Translator and Reviser. At the time of his separation from service in May 1989, the Applicant held a permanent appointment as a Senior Reviser at the P-5 level. The Applicant has two children, Catherine and David. Being an international recruit, he was entitled to an education grant in respect of each child in full attendance at a school, university or similar educational institution. The Applicant's daughter Catherine was enrolled at Yale University. This case deals only with the education grant relating to her.

Education grant payments are calculated on the basis of "Certificates of Attendance and Costs", bearing the seal of the school and signed by one of its representatives and indicating the dates of the child's attendance and the amounts actually paid to the institution. These, in turn, are certified by the staff member on the "Request for Payment of Education Grant" form, as being true to the best of his or her knowledge and belief. Education grants are paid on the basis of this double certification, by the school and by the staff member. The conditions for receivability of the grant are set forth in

READEX FICHE

Administrative Instruction ST/AI/181/Rev.6, as amended by ST/AI/181/Rev.6/Add.1, and ST/AI/181/Rev.6/Amend.1.

In 1985, the Internal Audit Division (IAD), conducted an across-the-board audit of education grant claims filed for the year 1983/1984. IAD sent to different schools and universities a standard form, in which the institution was asked whether payments made by staff to the institution were as reported by staff to the UN on their claims. When the school reported that payments were for a different amount, staff were asked to provide explanations.

On 30 May 1984, the Applicant filed a claim for education grants for his two children, for the school year 1983-1984. He attached to the claim, Certificates of Attendance and Costs filled in and signed by employees of the schools attended by his children, with a detailed break-down of the total costs paid. The Applicant claimed the sum of US$9,050 in respect of his daughter Catherine. In Section 4 of the Certificate of Attendance and Costs, signed by the Registrar of Yale College, it is stated that the Applicant made two payments of US$4,525 each, in July 1983 and November 1983. Based upon the information provided by the Applicant, the U.N. Administration calculated that he was entitled to the maximum benefit of US$4,500 (i.e., 75% of US$6,000).

On 27 March 1985, the Director, IAD, requested Yale University to confirm, on an audit form, whether the Applicant had paid US$9.050 to it in respect of the school year 1983-1984. On 28 June 1985, IAD received the audit form, in which the Yale Under Graduate Financial Aid Officer stated that: "the amounts listed above were <u>not</u> paid to us. Mr. Liu stated that he only received [US]$4,525, <u>not</u> [US]$9,050. Mr. Liu further stated that the [US]$4,525 was used for his daughter's Junior Term Abroad". On 1 July 1985, an auditor telephoned the Financial Aid Officer, who confirmed that the Applicant had made only one payment to the University, on 1 August 1983, in the amount of US$1,925. The auditor recorded the information on the audit form.

The Applicant was asked to provide an explanation for the discrepancies. On 15 July 1985, he submitted documentation relating to expenses incurred for his daughter's stay in Paris, during the Spring semester of 1983, as part of a programme conducted by Columbia University and approved by Yale. The Applicant had, in the meantime, been contacted by officials of Yale University and on 16 May 1985, had written to the auditor conducting the investigation, explaining in part that:

> "... the $9,050 on the application form was a year round estimate. For her academic and living expenses both in Paris and New Haven that year, I might have paid that much, but not solely to Yale. I paid 18 hundred US dollars to Columbia even before she went to Paris. And it is on record that Catherine has been living off campus since her junior year in Yale. The board expenses are rather hard to calculate."

He also asserted that it was only after his daughter returned from France that he realized that "overseas boarding is not covered by the U.N. educational grant".

According to the statement of the Assistant Secretary-General for Personnel Services to the Chairman of the Joint Disciplinary Committee (JDC), "in a subsequent interview [with the Applicant], it was clarified that the audit year being questioned was 1983-1984"; the expenses relating to his daughter's stay in Paris corresponded to the academic year 1982-1983.

On 4 February 1986, the Director, IAD, informed the Director, Division of Personnel Administration (DPA) of the results of his audit. He concluded that:

> "In our opinion, Mr. Liu did not provide us with any satisfactory explanation either in his letters dated 16 May 1985 and 15 July 1985, or in his interviews, as regards the reason why he submitted a Certificate of Attendance and Costs from Yale University which showed that he paid $9,050 when he knew that he had received financial aid which amounted to $7,950 and had paid the University only $1,925, also the fact that he accepted an

education grant of $4,500 which was based on incorrect costs of attendance of $9,050. As a result, he has been overpaid $3,056.25 and a copy of this memorandum is being sent to the Office of Financial Services to recover that amount from Mr. Liu."

On 10 February 1986, the Director, DPA, transmitted to the Applicant a copy of the IAD report. On 12 February 1986, the Applicant submitted his comments on the report. On 2 April 1986, the Director, DPA, advised the Applicant that his explanations were not considered satisfactory and that consequently, he was being charged with serious misconduct. In a reply dated 29 May 1986, the Applicant asserted that typewritten figures on the Certificate of Attendance and Costs had been typed in by the Registrar's Office and he did not know how the Registrar's Office had calculated them; that the handwritten figures were filled in by his daughter, who mentioned an amount of US$8,000 as general educational expenses for the year; that he did not know that Section 4 of the Certificate of Attendance and Costs which provides that: "payments were made by the staff member to the institution as follows", meant the amounts actually paid to the University; that he did not bring to the attention of the U.N. the fact that he had paid only US$1,925 to Yale University, because he thought that "other rather large expenses were calculated to offset the scholarship, and that, therefore, [he] would still be entitled to the maximum amount of the education grant". He denied the charges of fraud, misrepresentation and conversion.

On 15 September 1986, the Assistant Secretary-General for Personnel Services sought the advice of the JDC as to what disciplinary measures, if any, should be taken against the Applicant. On 8 March 1989, the JDC adopted its report. Its conclusion and recommendation read as follows:

"VII. CONCLUSION

67. The Panel ultimately had to decide whether any or all of the explanations put forward by

Mr. Liu as evidence of lack of intent were believable. Indeed, the central question of this case was whether the submission of his certification of the truth of a document containing incorrect information, on the basis of which he obtained monies from the U.N., monies to which he was not entitled, was inadvertent, as he claimed. In the final analysis, it was the Panel's considered opinion that the various explanations offered by Mr. Liu, strained credulity.

68. The Panel noted that, in general, lack of awareness of procedures is not an acceptable excuse, except in the most exceptional circumstances (e.g. lack of fluency in the language) which do not apply in the case at hand. Even if, for the sake of argument, the Panel accepted that Mr. Liu had not familiarized himself with the details of the education grant scheme, the Panel found it impossible to believe that he failed to comprehend the basic purpose and spirit of the education grant system, and his moral and legal responsibility to submit truthful and valid financial data in support of any and all claims for reimbursement.

69. The Panel wishes to emphasize that especially in cases involving a request for monies from the U.N., the very act of certification imposes serious responsibilities on staff members to assure themselves that the information attested to is correct. The failure of a staff member to make adequate efforts to verify the accuracy of the information being certified is in itself unacceptable behaviour. When, as in this case, the information turns out to be grossly incorrect and the staff member improperly profited from it being so, the Panel considers that the staff member must be held accountable and that he cannot later decline responsibility on the grounds that he neglected to acquaint himself fully with his obligations.

70. The Panel concluded therefore that it could not accept Mr. Liu's various explanations as being either plausible or defensible: taking all of the aforegoing factors into account, the Panel finds that Mr. Liu's conduct was unsatisfactory within the terms of Chapter X of the Staff Regulations.

VIII. RECOMMENDATION

71. The Panel observes that Staff Rule 110.3(b) sets forth a range of disciplinary measures which may be imposed under Staff Regulation 10.2 on

> staff members whose conduct is unsatisfactory. The existence of such a range of sanctions indicates that there are degrees of unsatisfactory conduct. Although the Panel found that Mr. Liu's conduct was unsatisfactory, it also concluded that his participation in the events was at the very least, a passive willingness to take advantage of a situation which may not have been of his creation. Accordingly, the Panel feels that although a major sanction is appropriate, imposition of the most severe disciplinary measure - dismissal - would be disproportionate to the gravity of the offence. In light of this, it is the unanimous recommendation of the Panel that Mr. Liu should be demoted to the P-4 level."

On 23 May 1989, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and advised him that the Secretary-General had decided to dismiss him for misconduct under Staff Regulation 10.2, para. 1 and Staff Rule 110.3(b). The letter read in part as follows:

> "The Secretary-General's decision is based on the Committee's conclusions that (i) the various explanations you provided for claiming the full amounts of education grant in 1983-84 were neither plausible nor defensible, (ii) your failure to make adequate efforts to verify the accuracy of information you certified was in itself unacceptable and that consequently (iii) your conduct was unsatisfactory within the terms of Chapter X of the Staff Rules. Such actions constitute misconduct which is obviously incompatible with continued membership of the staff and warrants dismissal under Staff Regulation 10.2 and Staff Rule 110.3(b)."

On 25 June 1989, the Applicant requested the Secretary-General to review the administrative decision to dismiss him for misconduct. On 8 August 1989, the Acting Under-Secretary-General for Administration and Management advised the Applicant that there were no grounds on which to reverse the contested decision. On 2 October 1989, the Applicant asked the Secretary-General to reconsider his decision. Not having received a reply, on 13 November 1989, the Applicant sought the Secretary-General's

agreement for direct submission of his appeal to the United Nations Administrative Tribunal, which was granted on 29 December 1989.

On 8 February 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant in disregard of the unanimous position of the JDC is disproportionate to the gravity of the offence.

2. The Secretary-General misunderstood the nature of the culpability ascribed to the Applicant and misapplied the relevant case law of the Administrative Tribunal.

3. The Applicant suffered injury from unequal treatment.

4. The disciplinary process was unduly prolonged.

Whereas the Respondent's principal contentions are:

1. The U.N. Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity and therefore, he has the responsibility of determining whether a staff member meets those standards.

2. The dismissal of the Applicant was preceded by ample opportunity for him to state his case; the actual decision was properly motivated, the Applicant was accorded equal treatment, and the Applicant was not injured by the duration of the disciplinary process, which resulted from careful consideration of his case.

The Tribunal, having deliberated from 12 October to 26 October 1990, now pronounces the following judgement:

I. This is an appeal from a decision of the Secretary-General dated 23 May 1989, reaffirmed on 8 August 1989, to dismiss the Applicant for misconduct under Staff Regulation 10.2

and Staff Rule 110.3(b). The Secretary-General's decision was based on a report of the Joint Disciplinary Committee (JDC) with respect to charges of serious misconduct against the Applicant. The misconduct consisted of the Applicant having falsely certified payments alleged to have been made by him in connection with a claim for education grant for the 1983/84 school year for his daughter.

II. The JDC found neither plausible nor defensible the Applicant's explanations for having falsely certified that he had paid to Yale University, on behalf of his daughter, US$9,050 when, in fact, he had actually paid US$1,925 and, as a result of the application of the Staff Rules, obtained an overpayment from the U.N. of US$3,056.25. The Secretary-General's decision was also based on the JDC conclusion that the Applicant's failure to make adequate efforts to verify the accuracy of the information certified by the Applicant was, in itself, unacceptable and that in its totality, the Applicant's conduct was unsatisfactory under Chapter X of the Staff Rules.

III. Although the Secretary-General took into account the careful and thorough evaluation of the facts by the JDC, he did not share the JDC's belief that "although a major sanction is appropriate, imposition of the most severe disciplinary measure - dismissal - would be disproportionate to the gravity of the offence." Accordingly, the Secretary-General did not adopt the unanimous recommendation of the JDC that the sanction consist of a one grade demotion of the Applicant.

IV. The Tribunal's consistent jurisprudence establishes that its review of disciplinary decisions by the Secretary-General is limited to determining whether the decision taken was flawed by a mistake of fact, an error of law, a deprivation of due process, or was vitiated by extraneous or prejudicial factors. In short, the Tribunal does not simply substitute its judgement for that of

the Secretary-General either with respect to the determination that misconduct has occurred or the appropriate discipline. The Tribunal's Judgements No. 210, Reid (1976) and No. 429, Beyele (1988), recognize that the Secretary-General is not obliged to adopt the recommendation of a JDC.

V. In this case, it is not clear what prompted the JDC to conclude that dismissal would be a disproportionate penalty. For the JDC found that the Applicant's conduct was unsatisfactory. It appears to the Tribunal that the JDC must have thought his conduct intentional when it described the Applicant's conduct as "at the very least a passive willingness to take advantage of a situation which may not have been of his creation" (emphasis added). This quotation evidently refers to the fact that the figures totalling US$9,050 whose accuracy the Applicant certified, were placed on the Certificate of Attendance and Costs form by Yale University. The Tribunal considers this fact as requiring more, rather than less, vigilance on the part of the Applicant in order to be certain that what he was certifying was accurate. In this case, not much in the way of vigilance would have been required for the Applicant to realize that there was a noticeable difference between US$9,050 and the US$1,925 payment made by him. At the very least, this should have been enough for him to initiate an inquiry from the Administration regarding his entitlement before he certified the payment. His failure to make any such inquiry is hardly a mitigating factor. It is thus difficult to understand how the JDC's above quoted observation could be taken as signifying the presence of any exculpatory factor that warranted the relatively mild penalty recommended. It appears that the Secretary-General did not see it in that light.

VI. The Tribunal is unable to find any prejudicial or extraneous factors having influenced the Secretary-General's decision. Likewise, the Tribunal finds that the Applicant's due process rights were fully respected. He was adequately informed

of the charges against him and was given ample opportunity to present his position. However, the disciplinary process extended over an unusually lengthy period of three years through no fault of the Applicant. Despite the fact that he was kept in his position at full pay throughout, there is no justification for that delay in the circumstances of this case. The Tribunal considers that, in this case, the excessive delay was tantamount to a moral injury for which the Applicant is entitled to compensation.

VII. With respect to the facts, it is quite clear that the Secretary-General did not act on the basis of any mistake. As noted above, the JDC went into this aspect of the case thoroughly and with care. Indeed, there is no dispute that the Applicant's certification was false. The only issue was whether the Applicant's explanations for what he had done were sufficiently convincing to constitute an excuse. Both the JDC and the Secretary-General concluded that they were not and the Tribunal has no basis for overturning their conclusions.

VIII. The Applicant seems to believe that he is entitled to a reversal of the Secretary-General's decision on the theory that there was no proof of a subjective intent on his part willfully to defraud the U.N. The Applicant appears to attach particular importance to his having established that the dollar amounts which appeared in Section 4 of the Certificate of Attendance and Costs were actually inserted by Yale University, a point discussed above. Beyond this, however, the Applicant misconceives the authority of the Secretary-General to make a determination of misconduct warranting dismissal. Once the Secretary-General establishes a false or inaccurate certification, presumptively constituting misconduct, it is then the responsibility of the staff member to present a satisfactory explanation. (Cf. Judgement No. 425, Bruzual (1988), para. XII). As the report of the JDC repeatedly indicates, the Applicant's

explanations for his conduct strained credulity, were difficult to understand and were not consistent with his conduct on other occasions. The Tribunal concurs in this analysis of the facts by the JDC. Moreover, as the Tribunal has previously pointed out, a staff member who signs a false certification bears the responsibility for having done so and cannot shift it to the Organization or to others by claiming ignorance or trust. (Cf. Judgement No. 424, Ying (1988), para. XVII). The Secretary-General therefore, not only cannot be said to have acted mistakenly, he was well within his authority in arriving at the conclusion he did.

IX. The Applicant also claims that he was treated unfairly in not being permitted to resign and in having been dismissed despite the fact that in two other cases involving improper receipt of education grants one staff member, since deceased, was demoted and the other resigned before being dismissed. The Tribunal does not consider that the Secretary-General is always required to impose identical discipline in cases involving a similar offence. This is particularly true in the absence of proof of prejudicial or extraneous factors influencing the choice of discipline imposed. The Secretary-General is entitled to consider each case on its own facts. Nor is the Secretary-General required to permit a staff member to resign after the staff member has been dismissed for misconduct.

X. The Applicant has requested that the Tribunal order the payment to him of a termination indemnity which, under Annex III (a) and (c) to the Staff Regulations, could not exceed six months' salary. Presumably, the Applicant's theory is that the termination indemnity is, in a sense, similar to a pension benefit which accrues with each passing year of service, and which should not be deemed forfeited even in a termination for misconduct. This is not an unreasonable position. However, the language of Annex III (c) leaves decisions of this nature to the

discretion of the Secretary-General. Where, as here, there is no evidence of prejudice or extraneous factors or other impropriety on the part of the Respondent, the Tribunal may not interfere with the Secretary-General's decision to award no termination indemnity.

XI. Taking into account all of the circumstances of the case, the Tribunal orders the Respondent to pay to the Applicant, in addition to the salary in lieu of notice provided for in the Secretary-General's decision dated 23 May 1989, three months of his net base salary at the rate in effect on the date of his termination.

XII. For the foregoing reasons, all other pleas are rejected.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 26 October 1990

R. Maria VICIEN-MILBURN
Executive Secretary